MPMc
Longview, WA

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

WAYRON, LLC

and 19-CA-032983

INTERNATIONAL BROTHERHOOD OF
BOILERMAKERS, IRON SHIP BUILDERS,
BLACKSMITHS, FORGERS AND
HELPERS OF AMERICA, LOCAL 104;
THE INTERNATIONAL ASSOCIATION OF
MACHINISTS AND AEROSPACE WORKERS, AFL-CIO,
DISTRICT LODGE 160, LOCAL LODGE 1350;
AND THE INTERNATIONAL UNION OF PAINTERS
AND ALLIED TRADES, DISTRICT COUNCIL 5

ORDER DENYING MOTION FOR RECONSIDERATION

On August 2, 2016, a three-member panel of the National Labor Relations Board issued a Decision and Order in the above-entitled proceeding.[1] The Board affirmed the decision of the administrative law judge and found, in relevant part, that the Respondent, Wayron, LLC, violated Section 8(a)(5) and (1) of the Act by refusing to submit to a financial audit during contract bargaining after asserting financial inability to pay wage increases, and by making unilateral changes to employees' wages and benefits.[2] Id., slip op. at 1-9. Among other standard remedies, the Board ordered the Respondent to (1) turn over the requested information to the Unions' auditor; (2) make

[1] 364 NLRB No. 60.
[2] In the absence of exceptions, the Board also adopted the judge's findings that the Respondent violated Sec. 8(a)(1), (3), and (5) of the Act in various respects. 364 NLRB No. 60, slip op. at 1 fn. 2.

contractually required benefit fund contributions; (3) rescind unilateral changes to the employees' terms and conditions of employment; (4) reinstate unlawfully discharged employees; and (5) bargain with the Boilermakers, Machinists, and Painters Unions. Id., slip op. at 9-10.

On August 29, 2016, the Respondent filed a motion for reconsideration of the Board's Order. The General Counsel filed an opposition, and the Respondent filed a reply.

Having considered the matter, we deny the Respondent's motion. The Respondent has not identified any material error or demonstrated extraordinary circumstances warranting reconsideration under Section 102.48(d)(1) of the Board's Rules and Regulations. Furthermore, we find that the Respondent did not bring the information to the Board's attention "promptly" in accord with Section 102.48(d)(2).

The Respondent asserts that "intervening circumstances" have rendered the Board's Order impossible to implement. Specifically, the Respondent asserts that the three Charging Party Unions have disclaimed interest in representing the Respondent's employees and that the Respondent has agreed to pay withdrawal liability to the multi-employer pension funds. As a result, the Respondent argues that it cannot comply with the Board's Order to submit to the financial audit, recognize and bargain with the Unions, or rescind its unilateral changes to the employees' working conditions.

In support of its argument, the Respondent proffered two declarations of its attorney with accompanying exhibits, including three letters from the Unions assertedly disclaiming representational interests, settlement agreements between the Respondent and the Machinists' Western Metal Industry Pension Fund and the Boilermaker-

Blacksmith National Pension Fund concerning withdrawal liability, and a series of email exchanges purportedly demonstrating the existence of a settlement agreement between the Respondent and the Oregon and Southwest Washington Painters pension plan for withdrawal liability.

Although the Respondent does not move to reopen the record, the gist of its motion is that the Board should consider its offered evidence of disclaimer that did not exist during the unfair labor practice hearing, and rely on that evidence to limit the remedy and Order for the violations found. Under Section 102.48(d)(1) and (2), "newly discovered . . . evidence which has become available only since the close of the hearing" "shall be filed promptly on discovery of such evidence." The Respondent's motion fails for two reasons.

First, the Respondent failed to establish that the evidence it seeks to introduce was "newly discovered" for purposes of Section 102.48(d)(1), i.e., that such evidence (1) was capable of being presented at the original hearing and (2) could not have been discovered by reasonable diligence. *Rush University Medical Center*, 362 NLRB No. 23, slip op. at 1 fn. 2 (2015), enfd. 833 F.3d 202 (D.C. Cir. 2016); see also *Allis-Chalmers Corp*., 286 NLRB 219, 219 fn.1 (1987) (denying motion to reopen record on the basis that the respondent "proffers evidence concerning an alleged event that occurred after the close of the hearing"). Because the evidence at issue here did not exist at the time of the hearing, it does not provide a basis for reconsideration or reopening the record under Section 102.48(d)(1). *APL Logistics*, *Inc.,* 341 NLRB 994, 994 fn. 2 (2004), enfd. 142 Fed.Appx. 869 (6th Cir. 2005).

Second, even assuming the evidence met the requirements of Section 102.48(d)(1), the Respondent failed to bring the evidence to the Board's attention promptly, as required by Section 102.48(d)(2). The Respondent's own motion makes clear that it was aware of the asserted disclaimers for several years, and the Respondent offers no explanation for its delay. See *Labor Ready Inc.,* 330 NLRB 1024, 1024 (2000) (finding untimely a motion that was filed 3 months after discovery of new evidence).

Finally, the General Counsel challenges the legitimacy of one of the disclaimers and the Respondent's asserted inability to fulfill its obligations under the Board's Order. As we stated in the underlying decision,[3] such issues are best resolved at the compliance stage. See *Lear Siegler*, *Inc.*, 295 NLRB 857, 861-862 fn. 29 (1989) (citing *Dean General Contractors*, 285 NLRB 573, 574 (1987)).

Accordingly, we deny the Respondent's Motion for Reconsideration. The denial is without prejudice to the Respondent's ability to raise in compliance proceedings all issues concerning the effect of the asserted disclaimers of representational interest and settlement of pension fund withdrawal liability on its remedial obligations.[4]

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[3] 364 NLRB No. 60, slip op. at 9 fn. 41 & 10 fn. 44.

[4] Although Acting Chairman Miscimarra adheres to the views he expressed in his separate opinion in the underlying decision, he agrees with his colleagues that the Respondent has not presented extraordinary circumstances warranting reconsideration of that decision. He disagrees, however, that a motion to reopen the record must relate to proffered evidence that could have been presented at the hearing, and he points out that Sec. 102.48(d)(1) of the Board's Rules and Regulations permits the introduction, on a motion to reopen the record, of "evidence which has become available only since the close of the hearing," which may include evidence regarding posthearing events. Under Sec. 102.48(d)(2), however, "a motion for leave to adduce additional evidence shall be filed promptly on discovery of such evidence," and Acting Chairman Miscimarra agrees with his colleagues that the Respondent's motion was not filed promptly on discovery of the evidence the Respondent seeks to introduce, which has been in its possession for

IT IS ORDERED that the Motion for Reconsideration of the Board's Decision and Order is denied.

Dated, Washington, D.C., January 23, 2017.

Philip A. Miscimarra, Acting Chairman

Mark Gaston Pearce, Member

Lauren McFerran, Member

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approximately 2 ½ to 4 ½ years. Finally, Acting Chairman Miscimarra also agrees with his colleagues that the issues the Respondent seeks to raise now can be addressed at the compliance stage of this case.